SHELL TIMUR SDN BHD

v.

ACHU BELON

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[ORIGINATING SUMMONS NO: 24-175-96-1]
20 JANUARY 1998

CONTRACT: *Rectification - Mutual/common mistake - Failure of agreement to reflect agreed terms - Whether rectification should be ordered - Facts to be considered - Specific Relief Act 1950, s. 30*

The plaintiff claimed rectification of a clause in a memorandum of sublease dated 9 May 1994 ('the memorandum') which it had entered into with the defendant, on the ground of mutual mistake. The clause provided for the lease of a piece of property from the defendant at a rent of RM6,000 per year for the first seven years, then RM9,000 for the next seven years and finally RM12,000 for the subsequent seven years ('the higher rents'). The plaintiff claimed that the rents should correctly be stated as RM500, RM750 and RM1,200 for the respective periods ('the lower rents'). The plaintiff called its manager, Patrick Chieng ('Chieng'), who had negotiated the lease with the defendant's agent, one Tan Chong Meng ('Tan'), to give evidence to the effect that the land was leased to erect a new petrol station and that the lower rents had been agreed upon after he, Patrick, had obtained the mandate from the plaintiff's head office. The mistake arose in a letter dated 27 June 1989 issued by Chieng to Tan. Furthermore, copies of the initial agreements between the parties showed that the rents of RM500, RM750 and RM1,200 had been obliterated and the figures RM6,000, RM9,000 and RM12,000 handwritten above them. Chieng was unable to explain how the mistake and the amendments to the figures arose. The parties also entered into a supplementary agreement dated 11 September 1991 which stated that they had agreed to vary and substitute the higher rents in the original memorandum of sublease dated 15 March 1990 with the lower rents.

The memorandum now sought to be rectified was prepared in 1994 after approval for the registration of the sublease was obtained. The plaintiff's legal officer testified that when she prepared the memorandum, she did not have sight of the supplementary agreement and therefore inserted the higher rents stated in the original memorandum of sublease.

Held:

[1] There was no challenge to the evidence given by Chieng regarding the mandate for the rents and therefore his evidence was accepted as the truth. The court, however, found that Tan was not a credible witness as his demeanour and vague replies left the court in no doubt that he was not telling the truth.

[3] As the agreements with the obliterations and amendments were at all material times in the plaintiff's custody, it could be assumed that the amendments were made by someone in the plaintiff's employ. However, the defendant was unable to explain why he had signed the supplementary agreement and this was an indication of his want of honesty. There was also evidence that the payment of the lower rents were made by the plaintiff and accepted by Tan and another agent on the defendant's behalf after the execution of the supplementary agreement.

[4] Despite the inadequacy of the plaintiff's evidence, nevertheless, because of the receipt of the lower rents by the defendant's agents and having considered all the evidence of the case, the court was convinced that the plaintiff's legal officer had made a mistake when she prepared the memorandum. The evidence was clear and convincing that the parties had intended the lower rents and as such, the clause was ordered to be rectified to reflect the lower rents.

[Plaintiff's application allowed with costs.]

Cases refered to:

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 ***(foll)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 ***(foll)***

Yuson Bien & Anor v. Bankers Trust Co Ltd [1980] 1 MLJ 32 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 92

Specific Relief Act 1950, s. 30

Other source referred to:

Chitty on Contracts, 26 edn, vol 1, para 379

Law of Contract, Cheshire & Fifoot's, 8th edn, p 219

For the plaintiff - Hon Salang; M/s Dr Yaacob & Ismail

For the defendant - Tan Cho Huat; M/s Teo Sebom, Tan & Madhi

Reported by Anne Khoo

JUDGMENT

Ian HC Chin

Introduction

In this action Shell Timur Sdn Bhd ('the plaintiff') claims rectification of cls. 1(a)(i), (ii) and (iii) of a memorandum of sublease dated 9 May 1994 which they had entered into with Achu Belon ('the defendant') on the ground of mutual mistake. That clause as it stands reads:

> 1. The Sublessee for himself and his successors in title and assigns to the intent that the obligations may continue throughout the term hereby created covenants with the Sublessor as follows:
>
> (a) To pay and discharge the reserved rent at the times and in the manner hereinafter provided:
>
> (i) from the 1st year to the 6th year 11th month at a fixed land rental of Malaysian Ringgit Six Thousand (RM6,000.00) per year;
>
> (ii) from the 6th year 12th month to the 16th year 11th month at a fixed land rental of Malaysian Ringgit Nine Thousand (RM9,000.00) per year.
>
> (iii) From the 16th year 12th month to the 26th year 11th month at a fixed rental of Malaysian Ringgit Twelve Thousand (RM12,000.00) per year.

The rectification sought is to change the three sums payable under (i), (ii) and (iii) to, respectively, RM500, RM750 and RM1,200. A trial was held on December 11, 12, 13, 15 & 16, 1997 and 5, 6, 7 & 9 January 1998. The law relating to the issue is common ground and I will set them out before I consider the evidence.

The Law

The Specific Relief Act 1950, s. 30, provides for rectification of an instrument in these words:

> When through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there had been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

The various principles governing rectification which our Federal Court approved in *Yuson Bien & Anor. v. Bankers Trust Co. Ltd.* [1980] 1 MLJ 32 are set out in *Cheshire and Fifoot's Law of Contract*, 8th Edn, at p. 219, *viz.:*

> The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified.[1] As regards the standard of proof required all that can be said is that the claim will fail unless the common intention upon which it is based is proved by convincing evidence. It is not necessary that the evidence should be 'irrefragable' as Lord Thurlow once suggested,[2] or that it should settle the question "beyond all reasonable doubt' as is demanded by the criminal law.[3] If the negotiations leading up to the execution of the written instrument were vague and inconclusive, so that it is impossible to ascertain what the parties really meant, then the writing represents the only agreement that has been concluded and there is no antecedent and common intention upon which rectification can be based.
>
> Moreover, it must be shown that the alleged common intention though once undoubtedly reached, continued unchanged down to the time when the instrument was reached. Proof that the parties varied their original intention and that the instrument represents what they finally agreed is fatal to a suit for rectification.[4]
>
> Finally, it must be emphasized that the issue relates not to the individual intention of the parties but to their common intention. If the defendant can satisfy the court that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded.[5]

One of the essential requirements for rectification is that there must be a prior common and continuing intention of the parties as to their real intention (*Yuson Bien & Anor. v. Bankers Trust Co. Ltd.*). As for proof, the denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight and unless the other party can convince the court that the document does not represent both parties' intention at the time of execution, rectification will only exceptionally be ordered (*Chitty on Contracts*, 26 Ed. Vol. I, para. 379). I turn now to the evidence to determine whether mutual mistake has been proved.

The Evidence

It all started when Patrick Chieng, the then Sarawak area manager of the plaintiff, and another employee Jonathan Chin (the then executive in charge of retail development) negotiated with Tan Chong Meng for the sublease of the land belonging to the defendant in order to put up a Shell petrol station at Sungai Tenggang Bazaar. He was at that time empowered to negotiate on behalf of the defendant. Tan Chong Meng was at that time the plaintiff's dealer for Sri Aman. Though there is controversy as to who actually approached who,

I do not think that is material. It is common ground that Patrick Chieng did enter into discussion with Tan Chong Meng in several meetings about the setting up of a new petrol station at Sungai Pinggang Bazaar ("new petrol station") on land belonging to the defendant. This negotiation started in 1988 or 1989.

Patrick Chieng explained that it is normal for the area office to put up a case to the head office for the setting up of a new petrol station and to ask the head office for a mandate as to the maximum rental that was to be paid for the land to be used for the petrol station. He explained that it was only after receiving this mandate that he would proceed to negotiate with the landowner to secure the best deal possible. It was thus that he in his letter dated 30 January 1989 put up a case to the relevant section in the head office for the new petrol station. There is no dispute as that that evidence. In this letter Patrick Chieng stated that the defendant was supported (probably by the plaintiff, by the use of the word "we" in the letter) in getting the land by the payment of a premium which would be refunded by the plaintiff to the defendant. This letter is in the following terms:

Internal Memorandum

From: MKAW Our Ref: R/3.38-JC
Date: 30/1/89

To: MKRN

CONFIDENTIAL

PROPOSED NTI HIGHWAY SERVICE STATION ON LOT 1 BLOCK 13 SILANTEK LAND DISTRICT AT 66 KM SERIAN/SRI AMAN ROAD, SUNGAI TENGGANG BAZAAR

We have supported an application for the alienation of a petrol filling station site containing an area of 1,106 sq metres (11,905 sq feet) at Sungai Tenggang Bazaar, 66 Km Serian/Sri Aman Road.

Applicant, Encik Achu Belon, who is a taxi driver in Sri Aman, tendered for that piece of land known as Lot 1 Block 13 Silantek Land District by way of premium and was awarded the site.

At the time that we supported Encik Achu Belon together with two other applicants, we had agreed in principle to refund him the premium if he is successful in acquiring the site.

A 60-year lease for Lot 1 Block 13 Silantek Land District had been issued to Encik Achu Belon in June 1987.

Site is now ready for the development of a petrol filling and service station and we are going ahead to develop a small highway service station on the site.

Details of the site are as follows:-

[Etc ...]

We look forward to receiving your mandate for the above to enable us to proceed with this project.

[Etc ...]

Please do not hesitate to contact us if you need further information on the above.

(Sgd) PATRICK CHIENG PING UNG

Encl

cc MKRE

That letter shows that the plaintiff through Patrick Chieng was in contact with the defendant or his attorney before 30 January 1989. However, no evidence was forthcoming as to the details of the discussion, like when the discussion took place and what were the bargains, like the length of tenure and the demands made by the defendant or his attorney. However, that letter confirmed the need for a mandate from the plaintiff's head office.

As regards the rental for the new station, Patrick Chieng said the amount was "discussed" with Tan Chong Meng during the initial negotiations and that the "correct rental negotiated with Tan Chong Meng" was as shown in his internal letter to another officer dated 6 July 1989, *infra.* He testified that the "correct rental negotiated with Tan Chong Meng" for the 30-year lease is (a) RM500 per year for year 1 to 10, (b) RM750 per year for year 11 to 20 and (c) RM1,200 per year for year 21 to 30 which was well within the mandate of RM800 a year for the first 10 years, RM1,000 a year for the next 10 years and RM1,200 for the final 10 years which he obtained from the head office. Since there was no challenge to his evidence as to the existence of mandate for a ceiling rental, I will take his evidence to be the truth. He said it was only after the mandate was "given" that he issued a letter to Tan Chong Meng on 27 June 1989 which he said contained errors as to the amount payable for the rental. This letter reads:

CONFIDENTIAL

Mr. Tan Chong Meng
Attorney for Encik Achu Belon
No 41 Main Bazaar
95000 SRI AMAN

R/2.38-JC
27 June 1989

Sarawak

Dear Sir

PROPOSED SERVICE STATION ON LOT 1 BLOCK 13 SILANTEK LAND DISTRICT AT 66 KM SERIAN/SRI AMAN ROAD, SUNGEI TENGGANG BAZAAR

We refer to this morning's discussion between your goodself and our Messrs Patrick Chieng, Annuar Mohamad and Jonathan Chin on the above subject matter and are pleased to confirm our agreement on the sublease of that piece of land on Lot 1 Block 13 Silantek Land District at 66 km Serian/Sri Aman Road for the development of a Shell filling station. The terms and conditions of the sublease are as follows:-

(1) You will be responsible for obtaining the Governor-in- Council's approval for Shell Timur Sendirian Berhad to lease the said land for a period of sixty (60) years.

(2) You are in agreement to sublease that piece of land on Lot 1 Block 13 Silantek Land District, approved and converted for petrol filling station development by the authority to Shell Timur Sendirian Berhad. The sublease is to be for a period of thirty (30) years firm and with firm option for Shell Timur Sdn Bhd for renewal for another thirty (30) years.

(3) In return for the sublease, Shell Timur Sendirian Berhad agrees to build a filling station and you will be given the first option to operate the filling station subject to the terms and conditions of our standard Service/Filling Station Operating Agreement, a copy of which is attached for your information.

(4) However, during the discussion, you have informed us that you have nominated Shell Sungei Tenggang Service Station to operate the service station. The appointment of Shell Sungei Tenggang Service Station as an operator for the filling station will be subject to their being able to obtain the necessary permit under the Petroleum Development Act 1974 and the retail licences under the Control of Supplies Regulations.

(5) In addition to Item (3) above, Shell will pay you an annual fixed land rental at the following quantum:-

(i) From Year 1 to Year 10, the fixed land rental is $500.00 per month or $6,000.00 per year.

(ii) From Year 11 to Year 20, the fixed land rental is $750.00 per month or $9,000.00 per year.

(iii) From Year 21 to Year 30, the fixed land rental is $1,000.00 per month or $12,000.00 per year.

(iv) At the end of the 30th year, Shell shall have the option to renew the lease for a further period of thirty (30) years and the land rental rates will be subject to negotiation.

The mode of payment of the above is yearly in advance.

(6) As part of the consideration for the sublease, we have agreed to reimburse you the conversion premium incurred on the said land. The amount of premium to be reimbursed to you is $50,186.00.

(7) The payment of land rental and the premium will be made to you on the 1st day of the month following the construction approval of the filling station from the local authorities.

(8) The Memorandum of Sublease for the above is subject to the approval of the Governor-in-Council. In the event that the sublease is not approved by the Governor-in-Council, an alternative agreement will have to be considered.

(9) Any earth-filling or levelling of the site will be for your account. The amount of earth-filling will be determined by our Engineering Department after we have surveyed the site. You will be responsible for submitting to the authorities the layout drawings on the proposed road drains and culverts at the site.

(10) (a) For the operator of the station, a Fixed Operating Licence Fee (FOLF) and Variable Operating Licence Fee (VOLF) is charged as follows.

[Etc ...]

Please confirm your agreement to the above by signing and returning to us the duplicate copy of this letter, to enable us to proceed further with this project.

Please do not hesitate to contact us if you need further clarification on the above.

We look forward to a pleasant and successful business association with you.

Yours faithfully

For SHELL TIMUR SENDIRIAN BERHAD

(Sgd) PATRICK CHlENG PING UNG
Sarawak Area Manager

Encl

I agree to the above terms and conditions.

...
Signature & Chop

cc MKRN/3

It is not established whether Tan Chong Meng signed on this letter to signify his assent as requested. It is relevant at this juncture to ask how the mistake came to be made as regards the rental payable to the defendant that is enumerated in cl. (5) of that letter which Patrick Chieng claimed is erroneous. In this regard, Patrick Chieng merely testified he made a mistake but he did explain how those sums came to be stated in cl. (5). Did he type the letter himself? Did he dictate the letter to a secretary who typed it? Did he write the letter for the typist to type? There are no answers to those questions. It was also not explained how he could have mistaken, RM500 per year for RM500 per month, RM750 per year for RM9,000 per year and RM1,200 per year for RM12,000 per year, when he had at all time negotiated with the defendant's attorney regarding those sums.

However, the subsequent letter of Patrick Chieng dated 6 July 1989 and addressed to his head office stated the lower sums for rental. That letter is in these terms:

Internal Memorandum

From: MKAW Our Ref: R/2.38-JC

To : MKRN Date: 6/7/89

CONFIDENTIAL

PROPOSED NTI ON LOT 1 BLOCK 13 SILANTEK LAND DISTRICT AT 66 KM SERIAN/SRI AMAN ROAD, SG TENGGANG BAZAAR

a Your case proposal approval MKR/RD. 1501. 14/SH dated 10/4/89 refers.

We wish to inform you that we have concluded our negotiations with the landowner's attorney, Mr. Tan Chong Meng, on the sublease arrangement for the above NTI site. The terms and conditions of the sublease are as follows:-

b (1) Lease Period: 30 years with firm option for renewal for another thirty (30) years.

(2) The sublessor will apply for the approval from the Governor-in-Council to sublease the above-said land to Shell.

c (3) The sublease rental is payable yearly in advance to the sublessor at the following rates:

(a) Year 1 to 10 - $500.00 per year

(b) Year 11 to 20 - $750.00 per year

d (c) Year 21 to 30 - $1,200.00 per year

(4) Conversion Premium: As part of the consideration for the sublease, Shell shall reimburse the sublessor for the conversion premium of **$50,186.00.**

e (5) The payment of land rental and the premium will be made to the sublessor on the 1st day of the month following the construction approval of the filling station from the local authorities.

(6) Operatorship: The sublessor is given the first right of refusal to operate the station subject to the usual terms and conditions.

f (7) In the event that the approval of the Governor-in-Council is not obtained, a Supply Agreement will be signed.

(8) Any earth-filling or levelling of the site will be for landowner's account.

We enclose herewith a copy of our letter of offer on the above.

g We will be writing separately to MLA to request them to prepare the Agreement to sublease for the landowner's signature.

(Sgd) PATRICK CHIENG

Encl.

h You will note that the negotiated sublease rental is substantially below the mandate given

i

This letter tends to support Patrick Chieng's allegation that he had made a mistake because of the lower sums mentioned there. This allegation of a mistake appears to be further supported by the fact that the rentals stated in the letter to Tan Chong Meng would have exceeded the mandate given to Patrick Chieng by his head office. But Tan Chong Meng gave a different account as to the rentals that had been agreed.

Tan Chong Meng claimed that it was one Lee Eng Hua, the then manager of the plaintiff, who approached him to negotiate the rental of the defendant's land. This evidence came as a total surprise because when Patrick Chieng said it was Tan Chong Meng who had approached, discussed and negotiated with him concerning the rentals he was not challenged and it was not put to him that it was Lee Eng Hua and not him. In fact, I am of the view that Tan Chong Meng was not telling the truth because he had on 1 November 1996 affirmed an affidavit asserting that he was approached by Patrick Chieng.

Therefore, I do not find the evidence of Tan Chong Meng in this regard credible. Consequently it cannot be true that Lee Eng Hua had agreed with him that the rental should be RM6,000, RM9,000 and RM12,000 per year for the respective periods. The demeanour of Tan Chong Meng also made me wary of his evidence. Since the matter of the negotiation of the rental is a one-off affair, in the sense that Tan Chong Meng could not be negotiating for rentals for many petrol station sites and there was no evidence to suggest that, one would expect Tan Chong Meng to be positive as regards the rental that was agreed upon. Instead, he gave evidence in a manner as if to avoid possible trouble with the law as regards the evidence he gave. This he did by qualifying his evidence with words like "if I remember correctly" and "if I am not mistaken". When this is considered together with the fact that the defence did not even dare to confront Patrick Chieng with the assertion that it was Lee Eng Hua and not him or Jonathan Chin who had discussed and negotiated with Tan Chong Meng, I am left in no doubt that Tan Chong Meng is not telling the truth when he said that at that time there was an agreement reached with Lee Eng Hua for the rentals to be at the sums he mentioned. Though there was a lack of explanation as how the mistake was made I am at this stage inclined to prefer the evidence of Patrick Chieng to that of Tan Chong Meng. However, before a definite conclusion on this issue can be made, the other evidence must be taken into account.

After the issuance of 6 July 1989 letter, Patrick Chieng went on leave and Huang Ie Liang, the plaintiff's industrial relations manager, acted in his place. Huang Ie Liang signed a letter dated 2 August 1989 that was prepared by Jonathan Chin. It was addressed to the legal department at the head office requesting the preparation of the agreement of sublease, memorandum of

sublease and the Retail Equipment Hire Agreement and Supply Agreement and at the same time providing the necessary details. This letter adverted to a "letter of offer to Tan Chong Meng" and to the rentals, respectively, of RM500, RM750 and RM1,200 per year. This letter, in my view, served to confirm the actual rentals that were agreed and, therefore, the mistake made in 27 June 1989 letter. That was still true when the documents, prepared by the legal department, showed the rentals respectively of RM500, RM750 and RM1,200 per year. There is no evidence as to what happened to these documents after they were received by the Kuching office of the plaintiff and Patrick Chieng cannot say whether they were shown to Tan Chong Meng. But the copies that were produced in court show an obliteration of the rentals stated there and, in their place, the hand-written words and figures showing respectively the rentals of RM6,000, RM9,000 and RM12,000 per month above them. This has somewhat clouded what otherwise was clear to me that there was a mistake. Why, then, were the hand-written amendments made to the documents and by whom were they made? If it was done by Patrick Chieng then it would throw a completely different picture on what really were the agreed rentals because if the rentals were agreed at the rate stated in the documents, there would be no reason for Patrick Chieng to amend them unless the rentals were those that the amendments indicate. However, Patrick Chieng had testified unchallenged that he did not make those amendments. Though Tan Chong Meng did not say whether those amendments were made as a result of his disagreement, it still leaves unanswered the question as to why it was done. This has some bearing because, in my view, it was a result of these amendments that the Agreement to Sublease dated 15 March 1990 (Exh. P23-28) and the undated Memorandum of Sublease (Exh. P29-37) that were signed by the parties bore the amended sums of RM6,000, RM9,000 and RM12,000 per year. Since these documents were in the custody of the plaintiff it can safely be assumed that the amendments were done by someone in the employ of the plaintiff. This view is supported by the fact it was mentioned in a letter dated 15 January 1990 from the Sarawak Area Manager to the legal department, when returning the documents, that they had vetted and made comments and amendments thereon. That letter supports my conclusion that it was someone in the Kuching office who had made those hand-written amendments even though it was not established who signed that letter but it bears the designation of "Sarawak Area Manager" as being the signatory. However, though the Sarawak Area Manager was at that time Patrick Chieng, the signature does not resemble his. Patrick Chieng had also said he did not make the amendments. But, someone assuming the mantle of Sarawak Area Manager did and it must be explained why those hand-written amendments were made. Unless it is explained, it can be said that, though the evidence

hitherto support the plaintiff's contention that there was an initial mistake which Tan Chong Meng knew, this no longer holds true with the deliberate hand-written amendments. However, that is not the end of the matter. There are other turns of events that had been relied on as evidence establishing mutual mistake.

Another employee of the plaintiff, Sim Teck Kiong, also testified. He was the engineering liaison and retail developer whose duties involved the acquisition of sites for petrol station and negotiations with the landowners. As for the present petrol station project, he took over from Jonathan Chin at the end of March 1990 when the latter left the service of the plaintiff. According to him, it was then that he discovered the mistake in the rentals after going through the file. He then met with Tan Chong Meng to explain to Tan Chong Meng that the rentals were not correct because "Shell had paid for the land premium and cost of investment for the building of the petrol station". He told Tan Chong Meng that the said respective annual rents should be RM500, RM750 and RM1,200 per year. He said that Tan Chong Meng there and then accepted the explanation and agreed to sign a new agreement. The result of this meeting was conveyed by Sim Teck Kiong to the head office in these terms:

> Your fax dated 19.7.91 concerning the above matter refers.
>
> Please be advised that we have 're-negotiated' with the landowner and he is agreeable to the correct sublease rentals as given below –
>
> Year 1- 10, $500.00 perannum
>
> Year 11-20, $750.00 perannum
>
> Year 21-30, $1,200.00 per annum
>
> Kindly inform MLA to prepare necessary documents for execution.
>
> In view of the above, appreciate if you can arrange to send the cheque for $50,186.00 being payment of premium soonest possible.

The fax referred to in the above message was unfortunately not produced but Mr. Tan took no issue on the omission. When Sim Teck Kiong was cross-examined he said Tan Chong Meng did not tell him he was unhappy about the reduction in the rental. He did not agree that he did not explain any mistake made by the plaintiff and he did not agree that he informed Tan Chong Meng that as the sublease cannot be registered the plaintiff had no assurance and therefore wanted a reduction in the rental. He further did not agree that he informed Tan Chong Meng that the reduction of rental was a temporary measure pending the consent of the Director of Land & Survey.

Before adverting to Tan Chong Meng's evidence in this regard, it is convenient, because Mr. Tan Cho Huat, learned counsel for the defendant, had referred to the terminology therein, to set out here the agreement, called the Supplementary Agreement, that was signed on 11 September 1991 as a result of this meeting between Sim Teck Kiong and Tan Chong Meng, *viz.:*

SUPPLEMENTARY AGREEMENT

AN AGREEMENT made this 11th day of September 1991 between ACHU BELON (BIC: K. 274584) c/o 41, Main Bazaar, Sri Aman, Sarawak (hereinafter called "the Sublessor") of the one part and SHELL TIMUR SENDIRIAN BERHAD, a company incorporated in Malaysia and having its registered office at Bangunan Shell Malaysia, Off Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur with a place of business at Jalan Biawak, P.O. Box 200, 93702 Kuching, Sarawak (hereinafter called "the Sublessee") of the other part.

WHEREAS:-

1. By an Agreement to Sublease and Memorandum of Sublease dated the 15th day of March, 1990 (hereinafter called "the Agreement of Sublease and Memorandum of Sublease") the Sublessor had agreed to sublease all that piece of land held under Lot 1, Block 13, Silantek Land District, Sarawak measuring approximately 1106 square metres (hereinafter called "the said Land") to the Sublessee at the rentals as stipulated therein and upon the terms and conditions therein contained.

2. The parties hereto are desirous of amending the rate of the rentals payable for the thirty (30 years sublease as specified in Clause 3(i), (ii) and (iii) and Clause 1(a) (i), (ii) and (iii) of the Agreement to Sublease and Memorandum of Sublease respectively.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. In consideration of the covenants herein contained the parties hereto have mutually agreed to vary and delete the rate of the rentals payable for the thirty (30) years sublease as specified in Clause 3(i), (ii) and (iii) and Clause 1(a) (i), (ii) and (iii) of the Agreement to Sublease and the Memorandum of Sublease and substitute the aforesaid rentals with the following rentals:-

"Clause 3 of the Agreement to Sublease and Clause 1(a) of the Memorandum of Sublease:-

(i) from the first (1st) to the tenth (10th) year at a fixed rental of Malaysian Ringgit Five Hundred (M$500.00) per annum;

(ii) from the eleventh (11th) to the twentieth (20th) year at a fixed rental of Malaysian Ringgit Seven Hundred and Fifty (M$750.00) per annum

(iii) from the twenty-first (21st) to the thirtieth (30th) year at a fixed rental of Malaysian Ringgit One Thousand and Two Hundred (M$1,200.00) per annum."

2. Subject only to the variations herein contained the Agreement to Sublease and Memorandum of Sublease and all other terms and conditions therein shall remain in full force and effect

3. This Agreement shall be binding upon the successors-in-title and permitted assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and the year first abovewritten.

Signed by the Sublessor through its Attorney)
TAN CHONG MENG (BIC K. 698570) vide)
Power of Attorney Instrument No. L322/1988) (Sgd)
dated 23.2.1988 and registered at the Sri Aman)
Land Registry office on 25.2.1988 in the)
presence of:-)

Name : LEE LEE LEE
NRICNO : K.646744

Signedby)
(NRIC NO:))
for and on behalf of) (Sgd)
SHELL TIMUR SENDIRIAN BERHAD)
in the presence of:-)

Name : DENNIS ONG
NRIC NO : K101934
PK/nn/Agmt 18/Achu

Tan Chong Meng confirmed that he met Sim Teck Kiong sometime in 1991 where a temporary reduction of the rental was requested because the sublease is pending approval. He said he discussed the matter with the defendant who was unhappy but was nevertheless left with no choice but to agree. Who then is telling the truth regarding the reason for the reduction of rental? Sim Teck Kiong's had asserted that he discovered the mistake when going through the documents. Mr. Tan had submitted that he is not a credible witness because he was contradicted by Hj Mohd Rasheed Khan, the plaintiff's in-house lawyer, who testified that it was the head office that discovered the mistake. Mrs. Hon Salang, learned counsel for the plaintiff, did not reply on this point. But I see no conflict in the evidence. It must be borne in mind that apart from the head office having a file on the matter, Kuching also has one. Therefore, the fact that the head office had discovered the mistake did not prevent Sim Teck

Kiong from discovering it as well from the Kuching file. On the other hand, the fact that he mentioned in his letter that "correct" rental was agreed to supports his assertion that he had discussed with Tan Chong Meng the rentals and had obtained his consent to a correction. However, Mr. Tan had submitted that the language used in the Supplementary Agreement does not support the contention that it was for the purpose of correcting a mistake because, contended learned counsel, not only that the Supplementary Agreement used terms like "amend" and "vary" but the letter of Sim Teck Kiong speaks of re-negotiation with the landowner. I have to agree with Mr. Tan that if the Supplementary Agreement was to correct the mutual mistake, it would require a simple recital to say so and instead the recital in the Supplement Agreement went to say that the parties had agreed to the rentals stated in the Agreement to Sublease dated 15 March 1990 and in the undated Memorandum of Sublease. This casts a doubt as to whether there was really a mutual mistake as opposed to a mistake solely on the part of Patrick Chieng in offering the higher rentals. The cloud thickens when you take into account the unexplained hand-written amendments, which I mentioned earlier, and when considered in the light of the defence case.

I have earlier said that I do not find Tan Chong Meng to be a credible witness. It is not only because of the reasons that I have already earlier stated and also because of the following reasons. Tan Chong Meng had said that the defendant had no choice but to agree to the terms of the Supplementary Agreement which he signed. He was questioned as to the assertion of the lack of a choice which obviously calls for an explanation since no duress was alleged to have been applied either on him or on the defendant. It was put to him that there was a choice, which was either to agree or not to agree to sign to which he answered: "I already explained the situation to the defendant. So he was very unhappy. So he still want to sign, what can I say." That does not explain why he cannot simply refuse to put his signature to the Supplementary Agreement or why the defendant cannot simply asked him not to put his signature. Therefore, he did not provide any explanation as to why he still signed if it was not for the reason that it was to reflect the mutual mistake in the rental. His inability to explain is an indication of his want of frankness. However, the plaintiff's case, for the reasons I have stated, is still left in some doubt as regards establishing common and continuing mistake.

Mrs. Hon Salang, learned counsel for the plaintiff, had argued that the starting point is the Supplementary Agreement upon which form the basis for a rectification of the Memorandum of Sublease dated 9 May 1994. Learned counsel contended that the reasons given by the witnesses for the defendant for signing the Supplementary Agreement cannot be admitted as evidence as,

according to learned counsel, that would contradict s. 92 of the Evidence Act 1950. That proposition of law, I am of the view is not correct because the legitimate surrounding circumstances can and should always be taken into account in construing an agreement (see *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 929 FC; [1995] 2 CLJ 11; *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 FC, at p. 31E). Before I deal further with the various contentions surrounding the signing of the Supplementary Agreement, it is better that I first complete the narration of the events leading to the signing of the Memorandum of Sublease dated 9 May 1994 which rectification is sought.

It will be recalled that approval was needed for the registration of the sublease. This was obtained around 1 February 1993 whereupon the plaintiff's legal officer, Khoo Bee Lian, went about getting ready the various memoranda of sublease for execution, one of which is the said Memorandum of Sublease dated 9 May 1994. It will be recalled this document stated the respective rentals payable per year to be RM6,000, RM9,000 and RM12,000 instead of the rentals stated in the Supplementary Agreement. She explained that after receiving the approval she went about preparing 33 memoranda of sublease in relation to 33 petrol stations, all at the same time. She testified that she did not have sight of the Supplementary Agreement when she prepared the Memorandum of Sublease dated 9 May 1994. She gave instruction to her staff to have a copy of the Memorandum of Sublease printed out from the computer while also giving instructions for the change in the commencement date and the duration of the sublease. She said she also gave instruction for amendments to be made in respect of the conversion premium and the deletion of an appendix. The final copy that was printed out (after making the said amendments) came from the diskette that contained the Memorandum of Sublease (exh. P29-36) which contained the clause that stated the disputed rentals. She said she should have looked at the file but did not and this resulted in the mistake of incorrectly stating the higher rentals instead of the lower rentals provided for in the Supplementary Agreement. Mr. Tan's view of this witness is that she is not to be believed. This is how Mr. Tan had submitted:

> 43. PW5 is also an unreliable witness. She testified that upon receipt of Exhibit P56-57 from Kuching Lands & Surveys Office, she immediately prepared final copy of the Memorandum of Sublease (NP p. 34 lines 13-16). Exhibit P56 was given to her directly by Kuching Lands & Surveys Office (NP p. 35 line 38), she did not receive any instruction from Plaintiff's Kuching Office to prepare the Memorandum of Sublease and that Exhibit P56-57 was the only document she received (NP p. 36). Then how did she know that John Rantai has been appointed the new Attorney of the Defendant (She did not look through file NP p. 35)?

44. PW5 also testified that she is very familiar with the Memorandum of Sublease Exhibit P58-66, she made the changes mentioned in NP p. 35 (lines 7-12) personally and apart from all those changes mentioned, there were no other changes and that the Memorandum of Sublease was printed directly from diskette and that the final copy of Exhibit P58-66 was taken from Exhibit P29-31 (NP p. 36). This is not true. See Examples: paras 1(a), 1(b), 1(c), 2, 3, 4(e), 5 and deletion of paras 3(g), 4 and 8 of Exhibit P29-36 as compared to Exhibit P58-66 (see annexure). If the Plaintiff would address their mind to make these changes, especially in respect of para. 1(a), why wouldn't they change the rentals payable? If their story that wrong rentals were inserted earlier is true, they would have been extra careful in ensuring that the correct rentals were inserted in Exhibit PS 8-66.

45. In view of the substantial differences between Exhibit P29-31 and Exhibit P58-66, the only inference is that Exhibit P58-66 was independently negotiated and agreed upon.

46. Hence the story of PW5 not looking into the file is difficult to swallow and the Plaintiff's allegation that the rentals in Exhibit P58-66 were not amended as the document was stored in computer diskette and as a result of oversight is both incredible and not probable in view of the various changes made to Exhibit P58-66 as compared to Exhibit P29-36.

In order to appreciate that submission it had to be stated that John Rantai took the place of Tan Chong Meng as the attorney for the defendant as from 6 November 1992. The previous documents adverted to Tan Chong Meng as the attorney and thus the diskette must also contain that data. However, the Memorandum of Sublease dated 9 May 1994 contained the name of John Rantai which makes one ask how did that name creep into the computer to replace that of Tan Chong Meng. There was no explanation. There was also substantial difference between the two documents as submitted by Mr. Tan. Mrs. Hon Salang did not reply to that submission of Mr. Tan and I will have to agree with Mr. Tan that Khoo Bee Lian had not provided any credible reason as to how the mistake came about.

Unsatisfactory as Khoo Bee Lian's evidence may be, there is still the Supplementary Agreement dated 11 September 1991 to account for. I have earlier said that Tan Chong Meng had willingly signed it and I cannot accept that there was no choice but for the defendant to accept it and for Tan Chong Meng to execute it. There is also the evidence that payment of the rentals were made by the plaintiff and accepted by Tan Chong Meng on behalf of the defendant after the execution of the Supplementary Agreement and in the amount provided thereunder. The first of such payment was made on 28 November 1991, which was after the signing of the Supplementary Agreement,

for the sum of RM1,000 being rental for two years, that is for 1 September 1990 to 31 August 1992. The second payment was made on 19 August 1992 for RM500 being the rental for the period 1 September 1992 to 31 August 1993. A third payment of RM500 was made on 20 August 1993 for rental from 1 September 1993 to 31 August 1994. A fourth payment of RM500 was made on 23 August 1995 for the rental of the period for which no clarification was given. However, Tan Chong Meng had admitted that he received a total of RM3,000 being the rentals for the years 1990, 1991, 1992, 1993, 1994 and 1995 and in respect of the RM1,500 for the years 1993, 1994 and 1995, he confirmed that he had handed the same to John Rantai the new attorney for the defendant. I am not unaware that Tan Chong Meng had tried to change his story regarding the payment of the rentals to John Rantai when he was re-examined by his learned counsel. This is how the questioning was done:

> Q: And in the middle of 1996 when you passed the money of RM1,500 to John Rantai you had intended it to be the payment of rentals for 1990, 1991 and 1992
>
> A: Yes

I am of the view that you cannot find a better illustration of a leading question than the one I have just quoted. In the end, it demonstrates that this witness is more incline to distort the truth than to tell the truth. He had in his written reply (P72) to a letter from the plaintiff (P71), asking for confirmation that he had paid rental totalling RM1,500 for the years 1993, 1994 and 1995 to John Rantai, confirmed it. Now when led by his counsel, he sought to change it to mean the payment was not for those years. It is obvious the parties had acted under the Supplementary Agreement with the plaintiff paying the rents provided thereunder and with Tan Chong Meng receiving them on behalf of the defendant. Surely, the defendant cannot approbate and reprobate. It is not a question of the defendant's merely asserting his right to the rentals, as contended by Mr, Tan, but an act confirming the Supplementary Agreement. The evidence of Tan Chong Meng which I have found not to be credible put quite a dent in the story of John Rantai, to whose evidence I now turn to.

John Rantai, as mentioned earlier, became the attorney for the defendant in place of Tan Chong Meng as from 6 November 1992. By this time Tan Chong Meng had already received the rentals at RM500 per year for three years, that is from September 1990 to August 1993. Despite ceasing to be the attorney, Tan Chong Meng continued to receive the rentals for another three years and which, as mentioned earlier paid over to John Rantai. John Rantai alleged that sometime towards the end of 1992 one Jeffrey Manan, who was then the plaintiff's marketing executive based in Kuching, contacted him to discuss the

terms for the sublease and this meeting resulted in an agreement that was reflected by the Memorandum of Sublease dated 9 May 1994. Jeffrrey Manan denied that. Jeffrey Maran testified that his duties involved purely the business operation of petrol stations and do not involve negotiations on the amount of sublease rental. As a witness, John Rantai was arrogant to the extent of being indifferent to what he said. This was exhibited when in answer to the first question in cross-examined he deliberately, deliberately because he took some time to answer, told a lie when he denied giving a veil threat to Jeffrey Maran at the court which he had earlier muttered was only a joke. This indifference is exhibited in his answers to other questions. He was asked whether any person from the plaintiff told him about the sublease after his negotiations, he answered in the affirmative and then later in the negative. There are other reasons why I prefer the evidence of Jeffrey Maran to that of John Rantai and these stem from the inherent improbability of the plaintiff agreeing to the terms alleged by the John Rantai. It will be recalled that the plaintiff already had the Supplementary Agreement in hand which provided for the lower rentals. Why, then, should the plaintiff through Jeffery Maran, not only reopen the matter but to agree to a higher rental that would entail an additional expenditure for the 30 years of RM305,500. It is just not possible that anyone would do that. Furthermore, if there really was such a meeting with the resulting agreement, one would expect something in writing either from the plaintiff or from John Rantai to confirm it. Yet there is none and there is no reference at all to that alleged meeting which is just not possible if there was such a meeting and agreement. The final reason for disbelieving John Rantai is that it is just not possible for Jeffrey Maran to have been clothed with power to negotiate and agreed to whatever terms without any limit, which John Rantai seems to suggest when he alleged that the one-hour meeting immediately ended in the agreement for the higher rentals.

Before I conclude, I must mention briefly the evidence of the defendant himself. What he said in court bears testimony to the little he knows, if not hardly at all, about the dispute herein. He related to the court what Tan Chong Meng was alleged to have told him, much of which I have already concluded that Tan Chong Meng was not telling the truth. His ignorance is demonstrated by the fact that despite the repeated questions of his counsel, he maintained that the sublease was already registered in 1992 when he appointed John Rantai his attorney which cannot be true because the approval was, it will be recalled, only given in 1993. To sum up, his evidence adds nothing to the case.

Having considered all the evidence of this case and though I have earlier on, before adverting to the payment of the rentals and the evidence of John Rantai and the defendant, harboured some doubt as to the cogency of the evidence of the plaintiff to support their case for rectification, all those doubts are now

removed after considering the payment of rentals and taking into account the inherent improbability of the evidence of John Rantai regarding his meeting with Jeffrey Maran which resulted in the alleged agreement. It is my view that John Rantai, because of the receipt of rentals from Tan Chong Meng knew of the existence of the Supplementary Agreement and that when he signed the Memorandum of Sublease dated 9 May 1994, he knew that there was a mistake as to the rentals. Despite the inadequacy of the evidence of Khoo Bee Lian, I am nevertheless, because of the payments made by the plaintiff and received by the defendant through his agents, Tan Chong Meng and John Rantai, convinced that she did make a mistake when she caused the Memorandum of Sublease dated 9 May 1994 was printed with the higher rentals instead of the lower rentals stated in the Supplementary Agreement. The evidence, which I have already adverted to, leading to the execution of the Memorandum of Sublease dated 9 May 1994, are clear and convincing that the parties had intended the lower rentals.

Conclusion

In the premises, I order that cl. 1(a)(i), (ii) and (iii) of the Memorandum of Sublease dated 9 May 1994 and registered at the Sri Aman Land Registry Office on 13 May 1994 as Instrument No. L. 1042/1994 be rectified in the following manner, *viz.:*

(a) by deleting the words and figures "Six Thousand (RM6,000.00)" in clause 1(a)(i) and substituting therefor the words and figures "Five Hundred (RM500.00)";

(b) by deleting the words and figures "Nine Thousand (RM9,000.00)" in clause 1(a)(ii) and substituting therefor the words and figures "Seven Hundred and Fifty (RM750.00)"; and

(c) by deleting the words and figures "Twelve Thousand (RM12,000.00)" in clause 1(a)(iii) and substituting therefor the words and figures "One Thousand Two Hundred (RM1,200.00)"

There will be costs to the plaintiff.

This page is intentionally left blank